although he agreed that the plaintiffs' employee, Taylor, who conducted most of the business with the defendant, was aware of such an agreement, but, with the greatest respect, it appears to us that the only reasonable inference to be drawn from the course of business and the other facts and circumstances of this case is that the plaintiffs agreed with the defendant that he would not be required to take or give delivery of rubber and that it would only be a matter of differences between the purchases and sales. This being so, the plaintiffs were not acting contrary to the mandate given to them by the defendant but, in fact, were implementing it when they diverted Registered Tenders from him. In short they were acting as agents for the purpose of making wagering contracts on his behalf and therefore they cannot recover from him the moneys which they have expended on his behalf in pursuance of those contracts.

In case it might be thought we have not considered the case of *Syn Thong & Co. v. Tong Joo (Hoo) & Co.*[6] and *Baker v. Sharma*[7] (unreported) which were relied upon in the Court below in support of the view that the contracts in the present case were not wagering contracts, we would add that in our opinion those two cases are distinguishable, having regard to the findings of fact upon which the decisions were based. In the first case Stevens J. expressly rejected the defendant's evidence that there was an agreement that the rubber would not be called for and only differences dealt in but added that if such an agreement had been established to his satisfaction, he would have held that the plaintiffs could not recover. In the second case Thomas C.J. found that the contracts entered into by the brokers were genuine contracts and therefore he discarded the suggestion of gaming, as far as the brokers were concerned.

The only remaining question to be considered is whether the contracts, both Category A and Category B, were illegal by reason of the fact that at the time the plaintiffs entered into them on behalf of the defendant, he was not licensed to purchase rubber under the Rubber Dealers Ordinance. This point was considered by Stevens J. in *Syn Thong & Co. v. Tong Joo (Hoo) & Co.*[6], *supra* who held that the provisions of this Ordinance did not apply to forward contracts to purchase unascertained rubber by description. In the later case of *Baker v. Sharma*[7] (unreported), Thomas C.J. expressed agreement with Stevens J.'s view but his remarks were *obiter*, and when the same case came before the Court of Appeal, further *obiter dicta* were pronounced on this point. Having regard to the conclusion we have reached on the issue of gaming and wagering, any comments we might make on this matter would also be *obiter*. and we think it is undesirable to add to the *obiter dicta* on this point.

Accordingly, we rest our decision upon the finding that none of the contracts placed by the plaintiffs on behalf of the defendant were genuine contracts for the delivery of rubber and that the plaintiffs agreed with the defendant that he would not be required to take or give delivery of rubber and that only differences should be payable. The contracts were, therefore, made by way of gaming and wagering and the plaintiffs cannot recover from the defendant money paid under them to third parties or any commission on them. For these reasons we are of the opinion that this appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Elias Bros.; Drew & Napier.*

PUBLIC PROSECUTOR
v. Dr. G. J. N. D'FONSEKA

[C. A. (Thomson C.J., Buhagiar J. and Sutherland Ag. J.) June 12, 1957]

[K. L. — F.M. Criminal Reference No. 5 of 1956]

Penal Code, s. 197 — False medical certificate — Purpose for which it was required — Whether necessary for prosecution to prove awareness of person who issues or signs.

Provident fund — Withdrawal of — Application based on medical certificate of unfitness — False certificate — Whether certificate required by law — Employees Provident Fund Ordinance, 1951, ss.13(1)(c) and 21(e) and (f) — Employees Provident Fund Rules, 1952, rr. 19(1) and 20(2)(a) and (b).

The points of law for the determination of the Court of Appeal in this reference are: (i) whether a certificate signed by a medical practitioner, and forwarded pursuant to Rule 20 of the Employees Provident Fund Rules, 1952 by a contributor to the Employees Provident Fund in support of an application to withdraw any amount standing to his credit in the Fund, is a certificate required by law to be given within the meaning of section 197 of the Penal Code; and (ii) whether before a person can be convicted of an offence in relation to the issuing or signing any certificate referred to in section 197 of the Penal Code it is necessary for the prosecution to prove that such person was aware of the purpose for which the certificate was required.

Evidence led by the prosecution was to the effect that the respondent, a medical practitioner, had given three medical certificates each to the effect that the person named therein was no longer capable of being employed and not likely to be an employee again. The person named in each of the certificate gave evidence that he had not been examined by the respondent. There was evidence that when the respondent signed two of the certificates he signed them without examining any person. Use was made of these certificates to obtain from the Employees Provident Fund the return of the amount standing to the credit of the persons named in each certificate. There was no evidence to show that the respondent was aware of the purpose for which the certificates were required or of the use to be made thereof.

Held: (1) it is not necessary that the certificate should have been signed or issued by the person legally empowered to sign or issue it. It may have been issued by a person wholly unauthorised, and still he may commit the offence, for all that section 197 requires is that the certificate must be one either required by law to be issued or signed, or it must relate to a fact admissible in evidence. There being no law requiring a medical practitioner to issue a certificate of unfitness, the evidence in this case does not disclose an offence under the first part of section 197;

(2) it is not every certificate which is admissible in evidence that comes within the provisions of the second part of section 197 — that part only applies to certificates which are admissible in evidence of the fact to which the certificate relates — in other words the certificates affected are those which are proof of the truth of the contents thereof. The documents covered by the provisions of law under consideration are certificates made by a person who is under a legal obligation to state the truth. Although the respondent was under an obligation to state the truth as a medical practitioner he was not under any legal obligation to do so;

(3) even assuming that the second part of section 197 applies to certificates given by a person when under no such legal obligation, he could not be found guilty under that section when the certificate given by him is produced in evidence unless he was aware of the purpose for which the certificate was required. In this case there is no evidence that the respondent was so aware, therefore no offence was disclosed under the second part of section 197.

Public Prosecutor v. D'Fonseka (1957) M.L.J. 72 reversed.

COURT OF APPEAL, reference under the provisions of section 34 of the Courts Ordinance.

E. Brown (Federal Counsel) for the appellant.

R. P. S. Rajasooria for the respondent.

The judgment of the Court was delivered by :—

Buhagiar J. : — This appeal came before this Court under the provisions of section 34 of the Courts Ordinance, 1948, on a certificate given for the determination of the following points of law, namely :—

(i) whether a certificate signed by a medical practitioner, and forwarded pursuant to Rule 20 of the Employees Provident Fund Rules, 1952 by a contributor to the Employees Provident Fund in support of an application to withdraw any amount standing to his credit in the Fund, is a certificate required by law to be given within the meaning of section 197 of the Penal Code; and

(ii) whether before a person can be convicted of an offence in relation to the issuing or signing any certificate referred to in section 197 of the Penal Code it is necessary for the prosecution to prove that such person was aware of the purpose for which the certificate was required.

The accused was charged before the Sessions Court on three similar charges of which the first read as follows :—

"That you on 19th September, 1955 at Kuala Lumpur, in the State of Selangor, issued a certificate required by law to be given knowing that such certificate is false in a material point to wit that Chan Ah Kok was no longer capable of being again an employee and thereby committed an offence punishable under section 197 of the Penal Code."

Evidence led by the prosecution was to the effect that the respondent, a registered medical practitioner, had given three medical certificates each to the effect that the person named therein was no longer capable of being employed and not likely to be an employee again. The person named in each certificate gave evidence that he had not been examined by the respondent. There was evidence that when the respondent signed two of the certificates he signed them without examining any person. Use was made of these certificates to obtain from the Employees Provident Fund the return of the amount standing to the credit of the persons named in each certificate. There was no evidence to show that the respondent was aware of the purpose for which the certificates were required or of the use to be made thereof.

At the close of the case for the prosecution the learned President of the Sessions Court held that there wss no case to answer on the ground that the medical certificates were not required by law to be given.

The Public Prosecutor appealed from this decision to the High Court. The appeal Judge allowed the appeal and reversed the decision of the learned President and ordered that the trial of the respondent be continued by the learned President calling upon the respondent for his defence. The appeal Judge held as follows :—

"On a review of the statute law it appears that a certificate of unfitness signed by a medical practitioner is required to be forwarded to the Board when application for withdrawal is made on grounds of medical unfitness and that such a certificate is medical evidence for the purpose of section 13(1)(c) of the Ordinance and is required by law to be given."

The argument of the Deputy Public Prosecutor before this Court was in support of this view held by the appeal Judge; he also submitted that if it be held that such certificates were not certificates required by law to be signed or given, such certificates related to a fact of which such certificates were by law admissible in evidence and therefore the facts proved were sufficient to enable the learned President to amend the charge accordingly under the provisions of section 173(h) of the Criminal Procedure Code.

It is necessary at this stage to refer to the relevant provisions of the Employees Provident Fund Ordinance, 1951, and the Rules made thereunder :—

Section 13(1)(c) of the Ordinance (No. 21 of 1951) reads as follows :—

"No sum of money standing to the credit of an employee may be withdrawn from the Fund except with the authority of the Board and, subject to any regulations and rules made under section 20 and 21 of this Ordinance, such authority shall not be given unless the Board is satisfied that --

On medical evidence, the employee is no longer capable of being, and is not likely to be again, an employee; . . . .

Section 21(e) and (f) confers the following powers :—

(e) to prescribe the procedure for the withdrawal of amounts from the Fund;

(f) to prescribe the evidence to be produced and the person, officer or authority to whom such evidence is to be produced for the purposes of section 13 of this Ordinance; . . . .

Rule 19(1) states:—

"A contributor wishing to withdraw any amount standing to his credit in the Fund, or where the contributor has died, the person claiming to be entitled under the Ordinance and the Regulations to the amount standing to the credit of the contributor, shall give notice to the Board in the Form EPF. 9 set out in the Schedule to these Rules

and rule 20(2) (a) and (b) read:—

Where the application is based upon the ground of medical unfitness the contributor shall forward with such notice a certificate signed by a medical practitioner, in support of his application.

If the Board is not satisfied by any medical evidence produced by the contributor the Secretary may appoint one or more medical practitioners as a Medical Board to examine the applicant and to report thereon and may require such applicant to appear before such Medical Board and be examined at such time or place as the Medical Board may appoint.

The argument of the Deputy Public Prosecutor briefly was that the provisions of the Employees Provident Fund Legislation above referred to require medical evidence as to unfitness to be forwarded to the Board whenever an application for the withdrawal of funds is made by a contributor on the grounds of unfitness to be an employee; according to rule 20(a) such evidence is to be given in the first place by means of a medical certificate; if such medical certificate satisfies the Board, they act upon it; if it does not satisfy them then a Medical Board may be appointed to examine the contributor applicant. That being so, it was argued, the certificates given by the respondent were certificates required by law to be given. We do not agree with this submission; such an interpretation is, in our opinion, a distortion of the clear meaning of section 197 of the Penal Code. The "requirement" refers not to the production of a certificate but to the obligation imposed on somebody to give or sign a certificate, such as, to take an obvious example, a certificate of the registration of a company given by the Registrar of Companies on whom a duty is imposed by law to issue such a certificate.

Counsel for the respondent submitted that the words "by him" should be read by implication after the words "required by law to be given or signed". There is no reason or justification for the import of such words; if the draftsman wanted section 197 to be read as if the words "by him" were included then he would have used the form adopted in various other sections of the Penal Code as for example in sections 179, 181 and 187; furthermore the addition of these words will have the effect of limiting the application of section 197; thus, for example, in the case of a public servant in the Registry of Companies who issues a false certificate of the registration of a company on behalf of the Registrar without the authority of the Registrar; in our opinion the issue of such certificate in the circumstances mentioned would be an offence under section 197 as it stands, but not if the words "by him" were implied, as the duty to issue a certificate is on the Registrar and not on the public servant.

As pointed out by *Gour* in The Penal Code of India, 6th ed., vol. 2 at p. 877:—

"It is not necessary that the certificate should have been signed or issued by the person legally empowered to sign or issue it. It may have been issued by a person wholly unauthorized, and still he may commit the offence, for all that the section requires is that the certificate must be one either required by law to be issued or signed, or it must relate to a fact admissible in evidence."

That being the interpretation we give to section 197 and there being no law requiring a medical practitioner to issue a certificate of unfitness we agree with the learned President that the evidence does not disclose an offence under the first part of section 197.

The next point to be considered is whether the certificates given by the respondent in the circumstances mentioned are certificates "relating to any fact of which such certificates are by law admissible in "evidence" and whether the facts proved disclosed a *prima facie* case under the second part of section 197. The Deputy Public Prosecutor submitted that Rule 20(2) requires an application by a contributor to be accompanied by a certificate signed by a medical practitioner in support of the application; if satisfied with such certificate the Board may accept it as evidence and act upon it; the medical certificates issued by the respondent, it was argued, clearly related to a fact (the unfitness of the contributor to be an employee) of which the certificate was, under the abovementioned rule, admissible in evidence and, that being so, the facts disclosed an offence under the second part of section 197.

It is important to note that it is not every certificate which is admissible in evidence that comes within the provisions of the second part of section 197; that part only applies to certificates which are admissible in evidence *of the fact* to which the certificate relates; in other words the certificates affected are those which are proof of the truth of the contents thereof. In our view, therefore, the documents covered by the provisions of law under consideration are certificates made by a person who is under a legal obligation to state the truth; this view becomes more apparent when one considers the scope and object of Chapter XI in which section 197 appears. Now although the respondent was under an obligation to state the truth as a medical practitioner he was not under any legal obligation to do so. But even assuming that the second part if section 197 applies to certificates given by a person when under no such legal obligation we

do not consider that a person could be found guilty under that section when the certificate given by him is produced in evidence unless he was aware of the purpose for which the certificate was required, and in the present case there is no evidence that the respondent was so aware. No offence was therefore disclosed under the second part of section 197.

On the above grounds the appeal is dismissed.

Appeal dismissed.

CHIA KHIN SZE v. THE MENTRI BESAR, STATE OF SELANGOR

[O. C. J. (Sutherland J.) April 11, 1958]

[K. L. — Originating Motion No. 6 of 1958]

Constitutional Law — Liberty of person — Right to counsel — Constitution of the Federation of Malaya, Art. 5(3) and (4) — Whether cl. (3) applies only to cases under the Criminal Procedure Code — Whether applies to cases arising under the Restricted Residence Enactment (Cap. 39) — Whether applies to cases arising from executive acts.

This was an application by a detainee under the Restricted Residence Enactment to be allowed representation by counsel and to call witnesses at an enquiry to be held under that Enactment. The respondent in exercise of the powers in section 2(i) of the Enactment had issued a warrant for the arrest and detention of the applicant, and he deemed a further enquiry to be necessary. The form of the further enquiry was one to be held in camera without the person concerned being represented by counsel.

The issue in this case was whether the Constitution gives a right to be defended by Counsel in such a case.

Held: (1) a right to be defended by counsel presupposes a right to be heard. In this case the respondent was under no obligation to hold an enquiry, therefore the applicant had no right to be heard, and he could not have the right to be defended by counsel;

(2) as the fundamental liberty under the Constitution Article 5 was intended to be merely declaratory of existing law, i.e., the law anterior to the Constitution, there was no right of representation by counsel in respect of an executive act;

(3) Article 5(4) of the Constitution is intended to apply to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment; similarly clause (3) of Article 5 of the Constitution does not apply to cases under the Restricted Residence Enactment.

[**Editorial Note:** See comment on this case at page xli **supra.**]

Case referred to:—

(1) *R. v. Inspector of Leman Street Police Station, ex parte Venicoff* (1920) 3 K.B. 72.

APPLICATION FOR MANDAMUS.

Cheah Theam Swee for the applicant.

P. G. Clough (Federal Counsel) for the respondent.

Sutherland J. : — This was an application to be allowed to be represented by Counsel and to call witnesses at the enquiry to be held under the Restricted Residence Enactment Cap. 39 as amended by the Restricted Residence (Amendment) Ordinance, 1948. In support of the application applicant affirmed that he was under detention with a view to an enquiry being held under the Restricted Residence Enactment. Permission for Counsel to represent applicant at the enquiry has been refused. Applicant does not know how to conduct the enquiry on his own behalf and he prayed that in the interests of Justice he be allowed to be represented by Counsel and to call witnesses at the enquiry.

Respondent, in reply, affirmed that in exercise of the powers in sub-section (i) of section 2 of the Enactment he issued a warrant for the arrest and detention of the applicant. Respondent deems a further enquiry to be necessary and an officer was appointed to hold it. The form of the further enquiry respondent deems necessary is an enquiry held in camera without the person concerned being represented by Counsel. Respondent prayed dismissal of the application with costs.

The foregoing represents the formal part of the application.

At the hearing Counsel for applicant referred to section 44 of the Specific Relief (Malay States) Ordinance, 1950 and Federal Counsel who represented the respondent conceded that this section applied. Mandamus, as such, was accordingly not in issue between the parties. Applicant's Counsel stated that the only issue was whether applicant should be represented by Counsel at the enquiry. In section 2 of the Enactment there was no express denial of the right to Counsel.

Counsel referred to Article 4 of the Constitution of the Federation of Malaya whereby the Constitution is the supreme law of the Federation. He then went on to cite Article 5(3) of the Constitution, and this, it appeared to me, was the strongest limb of his argument. As it should be read in its context, I set out Article 5(3), (4) & (5) :—

"5. (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

"(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey) be produced before a Magistrate and shall not be further detained in custody without the Magistrate's authority.

"(5) Clauses (3) and (4) do not apply to an enemy alien."

Counsel anticipated Federal Counsel's approach to the matter and he said it might be argued that